U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: **February 8, 2001**

Case No.: **1999-INA-222**
CO No.: **P1997-NY-02110694**

In the Matter of:

R.J. MAX CATERING, INC.
Employer,

on behalf of:

VASSILY TKACHUK
Alien.

Appearance: Earl S. David, Esquire
for Employer and Alien

Certifying Officer: Delores Dehaan
New York, New York

Before: Burke, Wood and Vittone
Administrative Law Judges

DECISION AND ORDER

Per Curiam. This case arose from an application for labor certification on behalf of Alien Vassily Tkachuk ("Alien") filed by R.J. Max Catering, Inc. ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Statement of the Case

On July 25, 1997, Employer filed an application for alien employment certification to fill the position of "Specialty Cook." The duties of the position were as follows: "Prepare and cook authentic Russian cuisine such as Roast Russian Pork, Beef Strogannoff [*sic*] and Pirogi. Arrange decoratively and garnish foods according to menu or customer order. Estimate food costs." (AF 100). Employer required two years of experience. *Id*.

The CO issued a Notice of Findings ("NOF") on August 31, 1998. (AF 28-30). The CO found the application deficient for two reasons. First, the CO found that Employer was not offering permanent, full-time employment, and thus in violation of 20 C.F.R. § 656.3, in that "none of the information and evidence submitted supports employer's contention that permanent full-time work can be guaranteed for a Cook whose sole responsibility will be to prepare & cook Russian foods." (AF 29). Employer was instructed to submit additional evidence to rebut this finding. Second, the CO noted that although Employer had re-posted the job as required by the State Department of Labor, it had failed to document how long the posting had lasted. Employer was instructed to document the dates of the posting. *Id*.

After obtaining an extension of time to compile the requested information, Employer filed its rebuttal on November 4, 1998. The rebuttal consisted of purchase orders and invoices (AF 78-79, 84-91, 93), a hand-written grocery list with prices (AF 92), receipts for services rendered (AF 80-83), applications for corporate charge accounts (AF 67-77), and tax returns (AF 36-66). Employer argued that its company had been expanding since it moved to its new location, and thus needed a new Russian specialty cook. Further, Employer stated that the job offer had been posted from September 8, 1998 to September 29, 1998. (AF 94).

On December 4, 1998, the CO issued a Final Determination ("FD"). (AF 95-96). The CO found that Employer had failed to adequately document a need for an additional full time foreign specialty cook. Specifically, the CO found that while the restaurant did offer some Russian specialties, the bulk of the menu dealt with other types of cuisine, and the catering contracts presented no evidence of the catering of Russian style cuisine. As Employer indicated it currently employed two Russian specialty cooks, the documentation submitted failed to support that Employer had a full-time position available. (AF 95).

On January 7, 1999, Employer filed a "motion to reopen/reconsideration/request for review." (AF 98-128). Employer submitted its corporate catering menu (which listed a "Russian Platter"), its restaurant menu (which, out of 41 selections, listed 3 Russian style selections), and 18 bills which documented instances where Employer had catered with Russian Platters from January 19, 1997, to

December 21, 1998.[1]

Instead of addressing the request to reopen or reconsider, the CO forwarded the file to this Office. Accordingly, the Board afforded Employer the opportunity to proceed with the case before the Board, or have the matter remanded to the CO. Further, the CO was instructed that if Employer did waive the remand, she should show cause why the newly submitted evidence should not be made a part of the record. On November 8, 2000, Employer indicated that it would waive remand and proceed with review before the Board. No response has been received from the CO.

Discussion

First, we must address the newly submitted evidence. Normally, such evidence is not considered before the Board. *See, e.g.*, *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). In the present case, the newly submitted evidence was submitted with a request for reconsideration. As the CO failed to address the request, it is impossible to determine if the CO found that this evidence was not admissible, or if she found that even after reconsidering the determination in light of the new evidence, the application should still be denied. Drawing adverse inferences from the failure to clearly address this issue, this panel finds that the evidence should be treated as if the CO considered it, and it will thus become part of the record. *Construction and Investment Corp.*, 1988-INA-55 (Apr. 24, 1989) (*en banc*); *B. Raeen Construction*, 1990-INA-352 (Mar. 27, 1991).

Having addressed what evidence is part of the record, we now turn to the application. In the present case, the CO is using 20 C.F.R. § 656.3 to challenge whether Employer actually needs a new Russian specialty cook. However, this regulation deals with an employer's capacity to employ, not the need for a person in this position, *i.e.*, whether it is a *bona fide* position.

In *Daisy Schmioler*, 1997-INA-218 (March 3, 1999) (*en banc*), the Board held that it is improper to challenge whether there is a *bona fide* position through the use of § 656.3. Further, when a CO is making such a challenge, it is incumbent upon the CO to be specific in the Notice of Findings as to the violation so that an employer may have an effective opportunity to respond. *Carlos Uy III*, 1997-INA-304 (March 3, 1999) (*en banc*). As Employer was never provided with sufficient notice, this case must be remanded and a new notice of findings issued, detailing what is in error in the current application, and what information is necessary to rebut those findings of error.

Based on the above discussion the following order shall enter.

ORDER

The Certifying Officer's denial of labor certification is hereby **VACATED** and **REMANDED**

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[1]Employer actually submitted 20 such bills; however, two were duplicates. (AF 117, 122; and 116, 123).

for further consideration consistent with this decision.

Entered at the direction of the panel by:

_____

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.